(5)

No. 04-229

Supreme Court, U.S.
FILED
SEP 28 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

COUNTY OF MILLE LACS,
Petitioner,

v.

MELANIE BENJAMIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICI CURIAE* OF CITY OF WAHKON, TOWNSHIP OF SOUTH HARBOR, AND LAKE MILLE LACS ASSOCIATION, INC., IN SUPPORT OF PETITION

GLENN P. BRUDER *
MITCHELL, BRUDER & JOHNSON
4005 West 65th Street
Suite 200
Edina, MN 55435
(952) 746-1840

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Where the Lake Mille Lacs Band of Ojibwa assert that the Mille Lacs Reservation consists of 61,000 acres, in apparent contradiction of this court's decision in *United States v Mille Lac Band of Chippewa Indians*, 229 US 4987 (1913), and simultaneously adopts its own statutes purportedly governing this expansive area in contravention of police and regulatory schemes enacted by county and municipal governments, is there an actual case or controversy permitting judicial intervention in the form of a declaratory judgment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTIFICATION AND INTEREST OF THE *AMICI*	1
WAHKON AND SOUTH HARBOR TOWNSHIP	1
LAKE MILLE LACS ASSOCIATION	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE GRANTED	5
I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS ON THIS IMPORTANT FEDERAL QUESTION	5
II. THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Allstate Ins. Co., v Employers Liab. Assur. Corp., 445 F.2d 1278, 1280 (5th Cir. 1971) 5

Allstate Ins. Co., v Green, 825 F.2d 1061, 1063 (6th Cir. 1987) 6, 7

Beacon Const. Co. v Matco Elec. Co., Inc., 521 F.2d 392, 397 (2nd Cir. 1975) 5

Cass Cty v United States, 570 F.2d 737, 741 (8th Cir. 1978) 10

Continental Ins. Co., v McKain, 821 F. Supp. 1084 (E.D. Pa 1993) 8

E.Adelmann and Co., v Triple A Speciality Co., 88 F.2d 852, 854 (7th Cir. 1937) 5

Evers v Dwyer, 358 US 184, 203 (1958) 6, 8, 9

Exxon Corp. v FTC, 588 F.2d 895, 900 (3rd Cir. 1978) 5

Green v Mansour, 474 US 64, 72 (1985) 10

Maryland Cas. Co., v Borrow Const. Co., 123 F.2d 558, 565 (4th Cir. 1941) 5

McDougald v Jenson, 786 F.2d 1465, 1481 (11th Cir. 1986) 5

Mille Lacs Band of Indians v State of Minnesota, 989 F.2d 994, 998 (8th Cir. 1993) 7

Minnesota Chippewa Tribe v US, 11 Cl. Ct. 221 (1986) 3

Ohio Cas. Ins. Co., v Marr, 98 F.2d 973, 975 (10th Cir. 1938) 5

Rosebud Sioux Tribe v Kneip, 430 US 584 (1977) 9, 10

Sherwood Med. Indus. Inc., v Deknatel, Inc., 512 F.2d 724, 729 (8th Cir. 1975) 5

Simmonds Accessories Limited v Elastic Stop Nut Corp. of America, 257 F.2d 485 (3rd Cir. 1958) 8

TABLE OF AUTHORITIES—Continued

	Page
State Farm Fire and Cas. Co., v Mhoon, 31 F.3d 979, 983 (10th Cir. 1994)	7
United States v Mille Lacs Band of Chippewa Indians, 229 US 498, 499 (1913)	2, 3
Wilton v Seven Falls Co., 515 US 277, 286-187 (1995)	10
Workman v Mitchell, 502 F.2d 1201, 1206 (9th Cir. 1974)	5
STATUTES	
Minn. Stat. § 412.231 and 609.034	2
28 USC § 2201	5

IN THE

Supreme Court of the United States

No. 04-299

COUNTY OF MILLE LACS,
Petitioner,

v.

MELANIE BENJAMIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICI CURIAE* OF CITY OF WAHKON, TOWNSHIP OF SOUTH HARBOR, AND LAKE MILLE LACS ASSOCIATION, INC., IN SUPPORT OF PETITION

IDENTIFICATION AND INTEREST OF THE *AMICI*

WAHKON AND SOUTH HARBOR TOWNSHIP

Wahkon and South Harbor are neighboring governmental units. Wahkon is organized as a municipal corporation, South Harbor is a township. Both municipalities are located wholly or partly within the 1855 reservation boundary of the Mille Lacs Band of Ojibwe Indians ("the Mille Lacs Band" or "the band"). Wahkon and South Harbor Township lie on or near Lake Mille Lacs which is a major vacation destination in north central Minnesota. The communities are both within

largely rural Mille Lacs County. Tourism is a primary industry for each municipality due to the aesthetic attractions of Lake Mille Lacs and its environs where recreational activities include fishing, hunting, camping, and golfing. Both municipalities raise revenues through the taxation of real estate within their respective borders. Each community is also charged with the responsibility for enforcing of its own penal ordinances and regulatory schemes.[1]

LAKE MILLE LACS ASSOCIATION

The Lake Mille Lacs Association, Inc., ("Lake Mille Lacs Association") is a Minnesota non-profit corporation. Its membership is open to "any person owning property by Lake Mille Lacs, off Lake Mille Lacs, and area businesses." Its mission is "to serve as an advocate for the protection and enhancement of Mille Lacs Lake [and] to assure its preservation for future generations." To accomplish this objective, the Lake Mille Lacs Association has authorized its directors to "express their collective voice" by taking positions involving diverse issues including "economic development, property protection, and/or any other issue . . ."

STATEMENT OF THE CASE

Pursuant to an 1855 treaty between the United States and the Chippewas of Minnesota, a 61,000 acre reservation was carved out for the Mille Lacs Band of Chippewa Indians along the southern and western shores of Lake Mille Lacs. *United States v Mille Lacs Band of Chippewa Indians*, 229 US 498, 499 (1913). By the late 19th century, the Mille Lacs Band relinquished more than 90 percent of this reservation to the United States. *Id* at 501-504. As a result of litigation

[1] In Minnesota, the violation of certain local ordinances may subject an individual to both civil and criminal legal consequences. In Minnesota, violation of local penal ordinances is a misdemeanor punishable by 90 days in jail and/or a $1,000 fine. *See* Minn. Stat. § 412.231 and 609.034

brought by the Lake Mille Lacs Band challenging the compensation paid to the band and its members, this court ruled that 1889 legislation had effectively resulted in the disposal of the majority of the lands constituting the 1855 reservation. The proceeds were to be held in trust for the benefit of the Lake Mille Lacs Band and its members. *Id* at 509. This court ultimately concluded these transactions resulted in "an unqualified power of disposal over the lands as the absolute property of the government." *Id* at 510.

In 1986 the US Court of Claims again reaffirmed the relinquishment of the reservation. *Minnesota Chippewa Tribe v US*, 11 Cl. Ct. 221 (1986). Beginning in the 1980s, the Mille Lacs Band also established two highly success ful casinos which began generating massive revenue. At approximately this same time, the band began asserting that the 1855 reservation boundaries had not been relinquished, but remained intact. The Lake Mille Lacs Band's official website declared:

> The boundaries of the Mille Lacs reservation cover 61,000 square acres in Mille Lacs County.

The band enacted its own ordinances reportedly governing activities on "all lands within the exterior boundaries of the Mille Lacs reservation and Sandy Lake reservation as established by the treaty of 1855 . . ." Mille Lacs Band Statutes § 9. The band and its members began refusing to abide by regulatory and zoning ordinances established by Lake Mille Lacs County and its municipalities (Complaint, paragraph 39). The band also pressured federal agencies, with some success, to recognize its claim (Complaint, paragraph 53 D-I).

Accordingly, Petitioner Mille Lacs County commenced a legal action seeking "a declaratory judgment that the exterior boundaries of the 1855 Mille Lacs Indian Reservation have been disestablished . . ." to clarify the County's ability to

assert legal authority over the areas ceded in 1889. A local bank, the First National Bank of Milaca, intervened in the litigation supporting Petitioner. Respondents brought a motion to dismiss the complaint which the District Court treated as a motion for summary judgment since Respondents had already filed an Answer[2]. The court granted summary judgment in Respondent's favor finding: (1) the Mille Lacs Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its remaining undisputed, 4,000 acres; (2) the Mille Lacs Band and its members have consistently complied—however grudgingly—with the County's zoning regulations and state traffic laws, 262 F.Supp. 990, 997 (D. Minn); and (3) there was no legitimate evidence the band's claims resulted in a "loss or degradation of local real estate values" *Id* at 998. As a result, the District Court determined no "live controversy" existed warranting invocation of "sweeping declaratory judgment power . . ."

Petitioner subsequently appealed the District Court's determination to the Eighth Circuit. That Court affirmed the District Court's decision[3]. Petitioner is now seeking a Writ of Certiorari. This brief is submitted in support of that request[4].

---

[2] Respondent's were foreclosed from filing a motion to dismiss after filing an Answer. *See* Federal Rule of Civil Procedure 12(b).

[3] However, the appellate court reversed the District Court's determination that its decision was "with prejudice" 361 F.3d 460, 464 (8th Cir. 2004).

[4] Counsel for Mille Lacs County and Respondent have furnished written consent to the filing of this brief. Counsel for the First National Bank of Milaca has verbally consented but is presently involved in a trial in another sate and his written consent is expected within a few days. As government bodies Wahkon and South Harbor Township do not require consent of other parties to file this brief. Supreme Court Rule 37.4. However, written consent for participation by the Lake Mille Lacs Association is needed.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS ON THIS IMPORTANT FEDERAL QUESTION.

Petitioner's Complaint sought a declaratory judgment clarifying its position within the disputed territory claimed by the Mille Lacs Band. 28 USC § 2201(a) states:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

This statutory provision has uniformly been interpreted as a remedial measure to be "liberally construed" and "not to be interpreted in any narrow or technical sense." *Sherwood Med. Indus. Inc., v Deknatel, Inc.*, 512 F.2d 724, 729 (8th Cir. 1975), *see also Beacon Const. Co. v Matco Elec. Co., Inc.*, 521 F.2d 392, 397 (2nd Cir. 1975); *Exxon Corp. v FTC*, 588 F.2d 895, 900 (3rd Cir. 1978), *Maryland Cas. Co., v Borrow Const. Co.*, 123 F.2d 558, 565 (4th Cir. 1941); *Allstate Ins. Co., v Employers Liab. Assur. Corp.*, 445 F.2d 1278, 1280 (5th Cir. 1971); *E.Adelmann and Co., v Triple A Speciality Co.*, 88 F.2d 852, 854 (7th Cir. 1937); *Workman v Mitchell*, 502 F.2d 1201, 1206 (9th Cir. 1974); *Ohio Cas. Ins. Co., v Marr*, 98 F.2d 973, 975 (10th Cir. 1938); *McDougald v Jenson*, 786 F.2d 1465, 1481 (11th Cir. 1986).

However, in the instant case, both the District Court and Eighth Circuit appear to have substantially departed from this framework. Both courts focused on the "actual controversy" language of § 2201 and concluded that neither Petitioner nor the Intervener bank had satisfactorily demonstrated what the

District Court Judge labeled a "live controversy." The Eighth Circuit agreed claiming the financial institution's concern about the effect the band's claims to real estate pledged as collateral to the lender were merely "speculative harms based on the future intent of the band." 361 F.3d 464. Similarly, the Court of Appeals rejected the County's request for a declaratory judgment because, despite its stated position, the Lake Mille Lacs Band had ultimately yielded and allowed the County to enforce both state and local law within the disputed tracts of land.

This construction ignored the fundamental design of the Declaratory Judgment Act. The statutory scheme is intended to allow judicial intervention in brewing disputes before they become conflagrations. That is why the statute empowers a court to "declare the rights and other legal relations" of the parties before it. To ascertain if a an actionable controversy exists under Section 2201 this court instructed, nearly 50 years ago:

> . . . the question in each case is whether the facts alleged, under the circumstances, show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Evers v Dwyer, 358 US 184, 203 (1958). Based on this general guide, a number of circuits have established substantially the following test to determine if a litigant is entitled to a declaratory judgment:

> (1) whether a declaratory action would settle the controversy; (2) whether it would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of 'procedural fencing' or 'to provide an arena for a res judicata'; (4) whether use of a declaratory judgment would increase friction between our federal and state courts and improperly encroach upon state jurisdiction;

and (5) whether there is an alternative remedy which is better or more effective.

Allstate Ins. Co., v Green, 825 F.2d 1061, 1063 (6th Cir. 1987), *State Farm Fire and Cas. Co., v Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994).

These factors wholly favor the exercise of judicial authority in this matter. When the District Court and Eighth Circuit refused to act, their decisions were in conflict, not only with the positions taken by other circuits and this court, but also with other decisions of the Eighth Circuit. For example, here the appeals court reasoned the diminuation of land value as a result of the band's claims was purely speculative and did not warrant the exercise of judicial authority. Yet, in a previous decision, involving the assertion of tribal hunting and fishing rights, the Eighth Circuit allowed persons holding property interests within the disputed territory to intervene in the litigation because the band's position "may effect . . . property values." *Mille Lacs Band of Indians v State of Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993). In this action, the intervener presented the testimony of a certified appraiser who testified that it was his opinion the band's newly revived claim to all 61,000 acres of the original reservation reduced property values for land owners in the disputed territories (Deposition of Roger Wagner, Tr. 72-73).

This is an issue of critical importance to both the parties and the *amici*. If land values are depressed, it effects the ability of the County and the municipalities within the county to raise revenue from property taxes. Depressed values also damage property owners within the disputed tracts, many of whom are members of the Lake Mille Lacs Association. Further, it is at least possible that the band's claims may inhibit the future ability of property owners to sell their land or the bank's ability to foreclose on its collateral. The practical effect of the Eighth Circuit's decision is to strip the bank and property owners of recourse to prophylactically

address the wholly unwarranted claims pressed by the Mille Lacs Band.

The effect of this decision on the County and its municipalities is equally troubling. The District Court received evidence that tribal members had refused to comply with local building and zoning regulations and the Complaint alleged that the Lake Mille Lacs Band had successfully pressed federal agencies, including the Bureau of Indian Affairs, and Army Corps of Engineers, to recognize its land claims (Complaint paragraphs 53E-I). As a consequence, basic government functions, such as the location and improvement of roadways, were effected. The Eighth Circuit felt this was insufficient because the parties had ultimately been able to resolve each of these disputes without civil or criminal litigation.

The problem with this reasoning is that it once again ignores the crucible purpose of a declaratory judgment—to efficiently address legal disputes at any early stage. One critical purpose of the Declaratory Judgment Act is to permit a court to declare the respective responsibilities of parties. *Continental Ins. Co., v McKain*, 821 F. Supp. 1084 (E.D. Pa 1993). It is not essential that either Mille Lacs County or the Intervener demonstrate that legal actions have been sparked by the Lake Mille Lacs Band's actions if their conduct will inevitably generate future civil proceedings or a criminal prosecution. *Simmonds Accessories Limited v Elastic Stop Nut Corp. of America*, 257 F.2d 485 (3rd Cir. 1958). Similarly, the County is not required to demonstrate tribal members have been charged with criminal offenses for their refusal to abide by local building regulations as a prerequisite to declaratory relief. *See Evers v Dwyer*, 358 US at 204. This court has already held that district courts should employ their authority under the Declaratory Judgment Act to determine a local government's ability to enforce its ordinances and regula tions when litigants having a "substantial immediate and real

interest in the validity of the statute . . . ." appear before it. *Id* at 204. This litigation plainly presented such a situation and the Court of Appeals' decision has created a wholly unnecessary conflict between the circuits and within the Eighth Circuit itself.

II. THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner argues, at some length, that this court's decision in *Rosebud Sioux Tribe v Kneip*, 430 US 584 (1977), dictated the justiciability of this particular controversy. In *Rosebud*, a South Dakota Indian tribe sought a declaratory judgment "that the original boundaries of their reservation [established in 1889] had not been diminished by three subsequent acts of Congress passed in 1904, 1907, and 1910 respectively." 430 US at 585. Justice Renquist rejected the tribe's claim, *Id* at 605, 609. It appears both the Eighth Circuit and this tribunal implicitly recognized the boundary dispute as an actual controversy within the framework of the Declaratory Judgment Act[5]. The *amici* generally agree with this analysis and believe that *Rosebud* is essentially indistinguishable from the instant litigation which also involves a boundary dispute. In that event, the appeals courts refusal to act plainly conflicts with a relevant decision of this court.

---

[5] Whether this type of boundary dispute was a justiciable controversy does not appear to have been litigated in *Rosebud*, but as Petitioner's counsel notes, the Eighth Circuit and this Court must have been satisfied the boundary dispute was an actual controversy or both tribunals would have been obligated to have determined the District Court was without jurisdiction due to this shortcoming (Petition for Writ of Certiorari, p.18).

The instant case also illustrates the Eighth Circuit's quixotic and puzzling approach to reservation boundary disputes. In *Rosebud*, where the tribe invoked the court's jurisdiction to press its boundary claims, the Eighth Circuit felt this to be a justiciable controversy, albeit one decided adversely to the tribe. *Rosebud Sioux Tribe v Kenip*, 521 F.2d 87 (8th Cir. 1976). Later, when a northern Minnesota county, sought similar relief, addressing tribal claims to disputed territory, the Eighth Circuit determined that an actual controversy did not exist. *Cass Cty v United States*, 570 F.2d 737, 741 (8th Cir. 1978).

Because this court's analysis in *Rosebud* focused on the substantive claims raised by the tribe, this court should consider granting certiorari to decide an important question of federal law that has not, but should be, settled by this court. Apparently, this court's decision in *Rosebud* has been insufficient to guide at least one circuit in its decisionmaking concerning these issues. There is no opinion by this court explicitly addressing the issue presented in this case. Moreover, this court's recent decisions discussing use of declaratory judgment powers have not established any specific framework to guide lower courts nor determined whether the standards employed by lower courts are appropriate. *See Green v Mansour*, 474 US 64, 72 (1985), *Wilton v Seven Falls Co.*, 515 US 277, 286-187 (1995). Although a litigant's entitlement to a declaratory judgment must, of necessity, be a fact driven inquiry, this is an opportune moment to establish a more concrete test. This will better guide lower courts and avoid the inexplicable and troubling results seen in the Eighth Circuit.

CONCLUSION

Although not critical to the immediate issues involved in this Petition, the District Court received testimony that the Lake Mille Lacs Band, armed with its substantial casino profits, had bought several tracts of land within the disputed area. Municipalities, such as Wahkon and South Harbor Township, rely on property taxes generated from levies against this land for revenue funding crucial government services. Similarly, these municipalities are entrusted with responsibility for adopting and enforcing building and other public safety regulations within their borders. Their ability to do so is threatened by the Lake Mille Lacs Band's insistence that its reservation includes the original 61,000 acres carved out by the 1855 Treaty. These municipalities, and Mille Lacs County, should not be required to await a cataclysmic event—such as a wholesale refusal by the Lake Mille Lacs Band and its member to submit to government authority—before the legal rights and responsibilities of these parties can be established. This is the fundamental principle underlying Congress' decision to enact 28 USC § 2201.

Similarly, private land owners and others interested in the welfare of Lake Mille Lacs, such as the Lake Mille Lacs Association, should not be forced to see their property diminished in value due to the illegitimate acts of the Lake Mille Lacs Band without having any recourse to judicial intervention to remedy this situation. For these reasons, the *amici* request the Petition for Writ of Certiorari be granted.

Respectfully submitted,

GLENN P. BRUDER *
MITCHELL, BRUDER & JOHNSON
4005 West 65th Street
Suite 200
Edina, MN 55435
(952) 746-1840

* Counsel of Record

September 20, 2004